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# Torts-Buzz Off! Expanding the Scope of a Landowner's Duty to Honey Bees Flying Along the Fine Line of Trespassing in *Anderson v. State Department of Natural Resources*

Melanie Triplett

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**CASE NOTE: TORTS—BUZZ OFF! EXPANDING THE  
SCOPE OF A LANDOWNER'S DUTY TO HONEY BEES  
FLYING ALONG THE FINE LINE OF TRESPASSING IN  
ANDERSON V. STATE DEPARTMENT OF NATURAL  
RESOURCES**

Melanie Triplett<sup>†</sup>

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<sup>†</sup> J.D. Candidate 2008, William Mitchell College of Law; B.A., Business Management, College of Saint Scholastica, 2001.

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## I. INTRODUCTION

What type of duty, if any, should land possessors owe to honey bees foraging on their property during pesticide applications? Generally, land possessors have not been held liable for damage to bees caused by pesticides sprayed on their own property.<sup>1</sup> However, in a significant deviation from the general rule regarding a landowner's duty, the Minnesota Supreme Court determined in *Anderson v. State Department of Natural Resources*<sup>2</sup> that land possessors who have knowledge of foraging honey bees on the property owe the bees a common law duty of reasonable care.<sup>3</sup>

Although both honey bees and pesticides play an important role in the agricultural economy of the United States, the two are not cooperative in their efforts.<sup>4</sup> The question of liability for damages to honey bees has often been addressed in the context of pesticides drifting from a landowner's property to a beekeeper's property.<sup>5</sup> However, the question of whether or not there should be a duty to protect foraging bees on a land possessor's own property is a unique question<sup>6</sup> and was one of first impression in Minnesota.<sup>7</sup>

This Case Note examines *Anderson's* decision and its possible effect on land-possessor liability to beekeepers in Minnesota and other jurisdictions.<sup>8</sup> First, the Case Note presents the history of both pesticides and honey bees in the United States.<sup>9</sup> Evaluating the history of each subject and the effect they have upon each other and the overall economy is crucial to understanding the balancing acts that courts should follow when confronted with

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1. See discussion *infra* Part IV.A.

2. 693 N.W.2d 181 (Minn. 2005).

3. *Id.* at 187; see *infra* Part V.B.3.

4. See *infra* Parts II.A, III.A-B., III.C.1.

5. See *infra* Part IV.A.

6. See *infra* Part IV.A-C.

7. See *infra* Part V.B.

8. See *infra* Parts V-VII.

9. See *infra* Parts II-III.

cases similar to *Anderson*.

Next, the Case Note discusses the legal history of pesticide liability as it relates to honey bees and the evolution of such liability in Minnesota and other jurisdictions.<sup>10</sup> Thus far, jurisdictions have varied extensively in the manner in which they have dealt with pesticide litigation.<sup>11</sup> This is due, at least partially, to the variety of ways in which pesticides are both used and applied.<sup>12</sup>

This Case Note then includes a detailed summary of the facts, procedural history, and decision of the *Anderson* case.<sup>13</sup> Finally, this Case Note concludes with an analysis of the *Anderson* decision and its probable implications to future litigation in this arena and, most importantly, to pesticide users and beekeepers.<sup>14</sup>

## II. THE HISTORY OF PESTICIDES

### A. *The Use, Growth, and Benefits of Pesticides*

All living things, including human beings, are limited in their growth by the availability of life-sustaining resources.<sup>15</sup> Therefore, it is important for humans to use their natural resources efficiently.<sup>16</sup> There are many ways to conduct efficient resource use, but pesticide<sup>17</sup> usage is one proven route for the United States.<sup>18</sup> Without pesticides, the United States would be unable to find a way to maintain its plentiful food supply and relatively high standard of living.<sup>19</sup>

Pesticide use dates back as far as Ancient Rome, when insects were killed by burning sulfur and weeds were controlled with salt

10. See *infra* Part IV.

11. See *infra* Part IV.

12. See discussion *infra* Parts III.C.1, IV.

13. See *infra* Part V.

14. See *infra* Parts VI-VII.

15. See KEITH S. DELAPLANE, PESTICIDE USAGE IN THE UNITED STATES: HISTORY, BENEFITS, RISKS, AND TRENDS 1 (2000), <http://pubs.caes.uga.edu/caespubs/pubs/PDF/B1121.pdf>.

16. *Id.*

17. Pesticides are any "substance or mixture of substances intended for: preventing, destroying, repelling, or mitigating any pest." U.S. Environmental Protection Agency, About Pesticides, <http://www.epa.gov/pesticides/about/> (last visited Apr. 11, 2006). "Pests are living organisms that occur where they are not wanted or that cause damage to crops or humans or other animals." *Id.* Examples of pests include insects, mice or rats, weeds, fungi, and bacteria. *Id.*

18. DELAPLANE, *supra* note 15, at 1.

19. *Id.*

concoctions.<sup>20</sup> By the late nineteenth century, U.S. farmers were attempting to control pests through various primitive means.<sup>21</sup> There were at least two major problems with early versions of pesticides. The first was that the active ingredients, such as arsenic, were highly toxic.<sup>22</sup> Thus, exposure through application or by eating foods containing pesticide residue could be deadly.<sup>23</sup> A second problem was that most suppliers were marketing pesticides that did not work as promised, thus frustrating farmers who paid substantial money with the hopes of having pest-free fields.<sup>24</sup>

Pesticide use during the 1940s and 1950s dramatically increased, partially due to the attention created by World War II soldiers falling victim to a range of pest-borne diseases.<sup>25</sup> The U.S. Department of Agriculture (USDA) promoted the widespread spraying of Dichloro-Diphenyl-Trichloroethane (DDT) to kill pests carrying diseases, including mosquitoes that could transfer malaria.<sup>26</sup> Today, the beneficial effects of pesticides are evidenced in developed countries by the control of tick and insect-borne diseases, such as yellow fever, typhoid, and malaria, and the sanitation of people's homes.<sup>27</sup>

The attention given to pesticides during and after World War II resulted in scientific developments making agricultural use of pesticides more feasible. Today, in poor and undeveloped countries, 95% of the population works to produce the food supply, but in developed countries such as the United States only 3 to 5% of the population is involved in food production.<sup>28</sup> The difference between the percentages is the efficiency created by

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20. *Id.* at 2.

21. *Id.* Farmers were often unsuccessful in controlling pests in their crop fields by way of copper acetoarsenite, calcium arsenate, nicotine sulfate, and sulfur. *Id.*

22. See Andrew P. Morriss & Roger E. Meiners, *Property Rights, Pesticides, & Public Health: Explaining the Paradox of Modern Pesticide Policy*, 14 FORDHAM ENVTL. L.J. 1, 4-5 (2002).

23. *Id.* at 5.

24. *Id.*

25. *Id.* at 6-7.

26. *Id.* at 7-8. DDT was banned by the Environmental Protection Agency in 1972 for virtually all but emergency uses in the United States because of its environmental persistence and food chain accumulation. U.S. Environmental Protection Agency, Terms of Environment, <http://www.epa.gov/OCEPAterms/dterms.html> (last visited Apr. 11, 2006).

27. DELAPLANE, *supra* note 15, at 4.

28. *Id.*

pesticide use in food production.<sup>29</sup>

As of 2000, pesticides were used on approximately 900,000 farms and in seventy million households.<sup>30</sup> One study found that 85% of U.S. homes contained at least one pesticide.<sup>31</sup> With increasing populations, the need for pesticides will rise because farmers must yield more crops on fewer acres and pest-borne disease must be controlled.<sup>32</sup> Scientists and lawmakers continue to work toward pest-control plans that are both environmentally sound and economically profitable.<sup>33</sup>

### *B. The Risks and Regulation of Pesticides*

During the period immediately following World War II, pesticides became overused and applicators became careless.<sup>34</sup> Hand in hand with pesticide overuse came increased recognition of the potential hazards they pose to human health.<sup>35</sup>

"Pesticides are designed to be toxic to living things; so by their very nature, they pose risks."<sup>36</sup> The main concern associated with pesticide use is the risk it poses to human health. People can be exposed to pesticides in one of three ways: inhalation, absorption through the skin, or oral exposure.<sup>37</sup> The most typical sources of pesticide exposure are food, personal use, drinking water, or work exposure.<sup>38</sup> Almost all of the foods we eat have been produced with the help of pesticides, so we may ingest residue that remains on the food.<sup>39</sup> Many homeowners use pesticides to control insects or weeds, thus coming in contact with them around their own homes.<sup>40</sup> Some pesticides make their way into our drinking water through erosion or drift, causing us to ingest them that way.<sup>41</sup> Finally, pesticide applicators and farm workers are often exposed

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29. *Id.*

30. *Id.* at 2.

31. *Id.*

32. *Id.* at 6.

33. *Id.*

34. Morriss & Meiners, *supra* note 22, at 13.

35. *See id.* at 14-16, 23.

36. DELAPLANE, *supra* note 15, at 4.

37. *See* U.S. Environmental Protection Agency, Assessing Health Risks from Pesticides, <http://www.epa.gov/pesticides/factsheets/riskassess.htm> (last visited Apr. 11, 2006).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

during the course of their jobs.<sup>42</sup>

In addition to human health risks, there is also concern about the broader environmental impact.<sup>43</sup> There is growing concern that increased use of pesticides creates pesticide-resistant pests.<sup>44</sup> Resistant pests could lead back to the dangerous cycle of pesticide overuse. There is also evidence that the majority of the pesticides applied to crops in the United States do not even reach the targeted pests.<sup>45</sup> Instead, they affect non-targeted areas or animals by way of drift, evaporation, run-off, or erosion.<sup>46</sup>

As a result of these concerns, the federal government enacted the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>47</sup> to address and reduce the adverse effects caused by pesticide overuse.<sup>48</sup> FIFRA prohibits the sale or distribution of any pesticide not registered with the Environmental Protection Agency (EPA).<sup>49</sup> The EPA examines all proposed pesticides and will approve registration only after a thorough review of their intended functions and effects upon the environment.<sup>50</sup> States are allowed to regulate the sale and use of pesticides so long as they do not permit any sale or use prohibited under FIFRA.<sup>51</sup> States cannot impose any pesticide labeling requirements in addition to or different from

42. *Id.*

43. See Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 VILL. ENVTL. L.J. 355, 365-68 (1990) (discussing the question of whether the benefits associated with pesticides currently outweigh the risks).

44. *Id.* at 367.

45. *Id.* at 366.

46. *Id.*

47. 7 U.S.C. §§ 136-136y (2000). FIFRA was enacted in 1947. *Id.* § 135.

48. See Brett & Potter, *supra* note 43, at 358-59.

49. *Id.* Under FIFRA, the EPA must only register a pesticide if the following requirements are met:

- (A) its composition is such as to warrant the proposed claims for it;
- (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
- (C) it will perform its intended function without unreasonable adverse effects on the environment; and
- (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5).

50. Brett & Potter, *supra* note 43, at 359. FIFRA defines environment as “water, air, land, and all plants and man and other living things therein, and the interrelationships which exist among these.” 7 U.S.C. § 136(j).

51. Brett & Potter, *supra* note 43, at 364.

those required by FIFRA.<sup>52</sup>

During the 1960s, researchers made another attempt to stop pesticide overuse, including its effect on non-targeted plants and animals and the increasing number of pesticide-resistant pests, by developing the integrated pest management (IPM) system.<sup>53</sup> IPM aimed to use cropping methods that encouraged natural predators to attack pests and also to time pesticide applications to coincide with the most vulnerable period of a pest's life.<sup>54</sup> IPM was not intended as a substitute for pesticides, but only as a supplement to improve their effectiveness and reduce their overall use.<sup>55</sup>

To further regulate pesticide use, the EPA determined "maximum allowable [pesticide] residue levels called 'tolerances' for thousands of crop and pesticide combinations."<sup>56</sup> A pesticide is only permitted for use on food crops if a tolerance level has been established.<sup>57</sup> The EPA also conducts evaluations to determine whether a specific pesticide poses "unreasonable environmental risks."<sup>58</sup> It is clear that although real risks exist with pesticide usage, researchers and government agencies are working to make sure that the risks do not outweigh the benefits.

### C. *Balancing the Risks and Benefits of Pesticides*

Societal changes have made it impossible to return to agricultural practices that existed prior to pesticides. There are shortages of farm workers because of urban migration.<sup>59</sup> The pay rate for laborers has increased, making pesticides more cost-effective.<sup>60</sup> Additionally, most shoppers do not buy fruits or

52. *Id.*

53. DELAPLANE, *supra* note 15, at 3.

54. *Id.* IPM involves the use of other techniques for pest management in agriculture, including crop rotations, mechanical cultivation, timed plantings, pest traps or barriers, and the use of selective herbicides. John Carlucci, *Reforming the Law on Pesticides*, 14 VA. ENVTL. L.J. 189, 211 (1994).

55. DELAPLANE, *supra* note 15, at 3.

56. *Id.* at 5.

57. *Id.* at 5-6.

58. *Id.* at 6.

59. See LEONARD P. GIANESSI & SUJATHA SANLUKA, NAT'L CTR. FOR FOOD & AGRIC. POLICY, THE VALUE OF HERBICIDES IN U.S. CROP PRODUCTION 58 (2003), <http://www.ncfap.org/reports/Herbicides/FullText.pdf> (summarizing studies conducted by NCFAP in April 2003 concerning the effect of non-use of pesticides on American farms).

60. *Id.*



vegetables with blemishes from plant disease or insects.<sup>61</sup> Because of this, most farmers must use pesticides to remain competitive.<sup>62</sup>

Many opponents of pesticide use are also advocates of alternative methods, such as organic farming, which relies solely upon natural fertilizers and pest control agents.<sup>63</sup> Cost increases associated with these alternatives, including increased labor for hand-weeding and application and income reduction, however, make it unlikely that farmers could maintain current crop yields without the use of pesticides.<sup>64</sup> A 2003 study conducted by the National Center for Food and Agriculture Policy (NCFAP) to determine the effects of pesticide nonuse showed dramatic declines in production and income, while simultaneously showing increases in weed control and labor costs.<sup>65</sup>

It is probably easiest to see the true benefits of pesticides by looking at the risks posed by discontinuing their use. A ban on pesticide use would undoubtedly cause a decrease in food production and raise prices, making U.S. farmers less competitive in the global market.<sup>66</sup> A ban on pesticides would likely create the need for an increase in farmed acres to make up for reduced yields per acre, thus causing a loss of wildlife habitats.<sup>67</sup> In addition, the more frequent cultivation of fields for weed control could cause erosion leading to soil loss.<sup>68</sup> Even our health could be adversely affected, because a lower production of fruits and vegetables means less consumption of those healthy foods.<sup>69</sup>

Another way to view the benefits of pesticides is through specific examples. One such example concerns the decline of the native lake trout population in the Great Lakes.<sup>70</sup> Sea lampreys, which are native to the Atlantic Ocean, began invading the Great

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61. *Id.* at 3.

62. *Id.*

63. See Brett & Potter, *supra* note 43, at 367-68.

64. GIANESSI & SANLUKA, *supra* note 59, at 57.

65. NAT'L CTR. FOR FOOD & AGRIC. POLICY, HERBICIDE NONUSE: TOP TEN STATES BY IMPACT (2003), <http://www.ncfap.org/reports/Herbicides/TopTen.pdf>. The NCFAP's study showed that discontinuing use of pesticides would create a 13.5 billion pound production loss and \$937 million reduced income in Minnesota. *Id.* In addition, the study showed that nonuse of pesticides would also increase Minnesota's weed control costs by \$449 million and labor by 506,000. *Id.*

66. DELAPLANE, *supra* note 15, at 3.

67. *Id.*

68. *Id.*

69. *Id.*

70. See GREAT LAKES FISHERIES COMM'N, SEA LAMPREY: A GREAT LAKES INVADER I (2000), [http://www.glfc.org/pubs/FACT\\_3.pdf](http://www.glfc.org/pubs/FACT_3.pdf).

Lakes during the mid-1800s.<sup>71</sup> Sea lampreys caused the decimation of lake trout in the Great Lakes during the 1940s and 1950s.<sup>72</sup> During the 1950s, the Great Lakes Fishery Commission (GLFC) discovered that TFM, a pesticide, could effectively control sea lampreys while remaining essentially harmless to other lake species.<sup>73</sup> TFM now has a “40-year track record of success” in controlling the lamprey population in the Great Lakes.<sup>74</sup> This is just one example of a pesticide as an environmentally beneficial agent.

In summary, pesticide use continues because the benefits outweigh the risks, especially since the implementation of IPM and other strategies that make pesticides effective, yet used less extensively.

### III. THE HISTORY OF HONEY BEES

#### A. *Beekeeping in the United States*

Bees are not endemic to North America.<sup>75</sup> The first honey bees were sent to America in 1623 after a failing apple orchard prompted settlers to recall the bees in European orchards and request that some be sent over.<sup>76</sup> Until the 1800s, beekeeping was primitive, although widely recognized as a valuable practice for the production of honey and beeswax.<sup>77</sup> Although they are normally considered *ferae naturae*,<sup>78</sup> because of their economic value courts have held since the 1800s that a qualified property interest may be acquired in bees if they can be reduced to possession.<sup>79</sup>

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71. *Id.*

72. *Id.*

73. GREAT LAKES FISHERY COMM'N, TFM AND SEA LAMPREY CONTROL: A SUCCESS STORY I (2000), [http://www.glfc.org/pubs/FACT\\_4.pdf](http://www.glfc.org/pubs/FACT_4.pdf).

74. *Id.* In fact, TFM has reduced the sea lamprey population in the Great Lakes by approximately ninety percent. *Id.*

75. See TAMMY HORN, BEES IN AMERICA: HOW THE HONEY BEE SHAPED A NATION 24 (2005).

76. *Id.*

77. See *id.* at 25-64 (detailing the various types of beekeeping practices that existed in early American colonies).

78. A *ferae naturae* is a wild animal. BLACK'S LAW DICTIONARY 653 (8th ed. 2004).

79. M.H.B., Annotation, *Law of Bees*, 39 A.L.R. 352, 353 (2005). A qualified property interest refers to a temporary interest in a thing that is subject to being terminated by the occurrence of an event over which the qualified owner has no control. BLACK'S, *supra* note 78, at 1254.

In 1851, Lorenzo Langstroth constructed a beehive with moveable frames so that beekeepers could remove one frame filled with honey and replace it with a new one for bees to build upon.<sup>80</sup> He also imported the Italian bee, which is the variety of honey bee most common in the United States today.<sup>81</sup> Thus began the commercial beekeeping industry.

Migratory commercial beekeeping<sup>82</sup> became possible during the 1870s, when previously closed trade routes were reestablished.<sup>83</sup> The commercial beekeeping industry developed right alongside the transportation industry.<sup>84</sup>

### *B. Pollination in Agriculture*

Prior to World War II, bees were used primarily for beeswax and honey, but after the war, the federal government began to recognize the important role of honey bees as pollinators.<sup>85</sup> Just as pollination was growing as a business, the prices of honey dropped, and beekeepers found that migratory beekeeping was the most profitable way to remain in the industry.<sup>86</sup>

During the 1970s, Dr. Willard Robinson brought increased attention to the value of honey bee pollination through research concerning Red Delicious apples.<sup>87</sup> Dr. Robinson found that the blossom structure on Red Delicious trees actually prevented honey bees from pollinating them.<sup>88</sup> However, Dr. Robinson discovered

80. HORN, *supra* note 75, at 86.

81. *Id.*

82. Migratory beekeeping is the practice of moving bees from location to location for honey crops and pollination. BeeCare, Honeybee Encyclopedia, <http://www.beecare.com> (last visited Apr. 11, 2006) (follow "Encyclopedia" hyperlink, then follow "M" hyperlink).

83. HORN, *supra* note 75, at 126-27.

84. *Id.* at 148. Migratory beekeeping was first made possible via commercial train routes. *Id.* at 145. However, with the invention of the automobile, the transportation of domesticated honey bees for commercial purposes was made even easier. *Id.* at 149.

85. *Id.* at 200. America's emergence as a major world power and supplier of food created the government's increased recognition of the importance of crop pollination by honey bees. *Id.* Pollination is the transfer of pollen from one plant to another for fertilization. American Beekeeping Federation, Honey Bee Pollination Crisis: Shortage of Bees May Reduce Crop Production, <http://abfnet.org/?p=51> (last visited Apr. 11, 2006).

86. HORN, *supra* note 75, at 206.

87. *See id.* at 221-22.

88. *Id.* This unique blossom structure of Red Delicious apple trees probably contributed to the brand not being as productive in the past, even though it had been developed in 1872. *Id.*

that farmers could plant crab apples, which are known cross-pollinators, in the Red Delicious orchards, and then place more beehives to ensure adequate pollination of the crab apple trees.<sup>89</sup> His study demonstrated the importance of understanding the complex role of pollination in agriculture.

Today, approximately 1600 beekeepers manage commercial colonies in the United States.<sup>90</sup> Providing honey bees for crop pollination is the easiest and most reliable service in planned pollination.<sup>91</sup> More than 3.5 million crop acres in the United States depend upon honey bee pollination.<sup>92</sup> It is estimated that more than 100 crops are pollinated by bees, and about one-third of the food that Americans eat comes directly from those crops.<sup>93</sup> As of 1997, the estimated value added to United States crops by honey bees was \$10 billion.<sup>94</sup>

### C. *Problems for Commercial Beekeepers*

#### 1. *Pesticides*

Beginning with the take-off of migratory beekeeping in the 1950s, beekeepers were usually the last to know about pesticide application schedules and so incurred many losses in their colonies.<sup>95</sup> Extensive bee kills during the latter 1960s were responsible for many commercial beekeepers going out of business.<sup>96</sup> As of the mid-1990s, bee poisonings from pesticides

89. *Id.*

90. American Beekeeping Federation, *supra* note 85. Commercial beekeepers are defined by the American Beekeeping Federation as "those beekeepers who manage more than 300 colonies of bees." *Id.*

91. MID-ATLANTIC APICULTURAL RESEARCH & EXTENSION CONSORTIUM, POLLINATION, PUB. 5.2 (2000), [http://maarec.cas.psu.edu/PDFs/Pollination\\_PM.pdf](http://maarec.cas.psu.edu/PDFs/Pollination_PM.pdf) [hereinafter MAAREC].

92. *Id.*

93. MID-ATLANTIC APICULTURAL RESEARCH & EXTENSION CONSORTIUM, BEES ARE BENEFICIAL, PUB. 1.1 (2000), [http://maarec.cas.psu.edu/PDFs/Bees\\_are\\_Beneficial\\_PM.pdf](http://maarec.cas.psu.edu/PDFs/Bees_are_Beneficial_PM.pdf).

94. Dennis Senft, *Helping Honey Bees Fight Mites*, AGRIC. RES., May 1997, available at <http://www.beesource.com/news/article/beecells0597.htm>. A variety of well-known crops are pollinated by bees, including clover, apples, apricots, kiwi, cherries, peaches, almonds, cashews, cotton, sunflower, broccoli, celery, onions, beans, and peppers. This list is far from exhaustive. MAAREC, *supra* note 91.

95. HORN, *supra* note 75, at 207. Because the chemicals had little or no effect upon other farmers' livestock or crops, the beekeepers did not have much recourse for the losses they suffered. *Id.*

96. *Id.* at 214-15. In Arizona alone, honey bee populations declined almost

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resulted in annual losses in crop revenue of \$14.3 million.<sup>97</sup>

The EPA has designated Carbaryl as “one of the most widely applied [pesticides] in the U.S.,”<sup>98</sup> which is most likely the reason for it being regarded as one of the most dangerous pesticides.<sup>99</sup> It is highly toxic and has killed more bees in California than any other pesticide.<sup>100</sup>

## 2. *Mites*

Pesticides are not the only hindrance to commercial beekeepers. The varroa mite, the most troublesome mite to honey bees, first migrated from Asia to the United States in 1987 and wiped out thousands of bee colonies.<sup>101</sup> The varroa mite is a honey bee parasite that infests colonies and can destroy an entire colony in a matter of months.<sup>102</sup> The American Beekeeping Federation estimated that 50% of California bee colonies have been killed or severely weakened due to the parasitic varroa mites.<sup>103</sup> One entomologist estimated that commercial beekeepers nationwide have lost about half of their hives as a result of mite infestations.<sup>104</sup>

## D. *Honey Bees in Minnesota*

Minnesota ranks among the top five states for honey production and is currently a base for more than fifty migratory beekeepers.<sup>105</sup> The Minnesota Department of Agriculture (MDA)

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50% between 1963 and 1977. *Id.* at 215.

97. North American Pollinator Protection Campaign, Pollinators, <http://www.nappc.org/pollinator.html> (last visited Apr. 11, 2006).

98. Beyond Pesticides, Chemical Watch Factsheet: Carbaryl, <http://www.beyondpesticides.org/pesticides/factsheets/Carbaryl.pdf> (last visited Apr. 11, 2006). Carbaryl use began in 1959 and according to the EPA, approximately ten to fifteen million pounds are used annually. *Id.*

99. *Id.*

100. *Id.*

101. HORN, *supra* note 75, at 228.

102. Alfredo Flores, *Saving Bees: Fungus Found to Attack Varroa Mites*, AGRIC. RES., Oct. 2004, available at <http://beesource.com/news/article/fungus.htm>. The varroa mite reproduces on worker bees and creates year-long hive susceptibility, as opposed to only seasonal inflections. HORN, *supra* note 75, at 228. In the 1980s, the mite caused such destruction in the beekeeping industry that many states imposed quarantines upon beekeepers. *Id.*

103. American Beekeeping Federation, *supra* note 85.

104. Senft, *supra* note 94.

105. See MINN. DEP'T OF AGRIC., APIARY PROGRAM REPORT 1 (2004), <http://www.mda.state.mn.us/apiary/04apiaryreport.pdf>. Minnesota honey production is valued at approximately \$12 million annually. *Id.*

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requires all beekeepers to register their colonies.<sup>106</sup> MDA records show that there are 421 registered Minnesota beekeepers managing more than 120,000 colonies.<sup>107</sup> Approximately 86% of those colonies are kept by migratory beekeepers who make their living in the commercial beekeeping industry.<sup>108</sup> Colony registration is used by the MDA to inspect hives regularly and is available to pesticide applicators upon request.<sup>109</sup>

The number of pesticide-related complaints from Minnesota beekeepers has been steadily increasing since 1996.<sup>110</sup> From 1996 to 2000, the MDA received twelve complaints regarding alleged pesticide-related bee kills.<sup>111</sup> Only two were found to have sufficient evidence to support a pesticide-related bee kill due to negligent application by someone other than the beekeepers.<sup>112</sup> In 2001, the MDA received eight complaints, of which seven were found lacking sufficient evidence to conclude death resulting from pesticide exposure.<sup>113</sup> In 2002, the MDA received ten complaints, of which only one was found to have sufficient evidence that a nearby pesticide application caused the honey bee deaths.<sup>114</sup>

MDA laboratory analysis of beekeeper complaints has yet to find widespread detections of Sevin (Carbaryl), which was alleged to be the primary pesticide used in most of the complaints reported since 2000.<sup>115</sup> But in each case, coumaphos, a pesticide used by beekeepers to control the varroa mite, was detected in the hives.<sup>116</sup>

106. MINN. STAT. § 19.64, subd. 1 (2004). The law regarding registration applies to anyone who "owns, leases, or possesses colonies of bees." *Id.* The maximum annual registration fee is only fifty dollars. *Id.*

107. See MINN. DEP'T OF AGRIC., *supra* note 105, at 1.

108. See *id.* The remainder of the colonies are managed either by sideline beekeepers, who keep eleven to 799 colonies, or hobbyists, who keep ten or fewer colonies. *Id.*

109. Minnesota Department of Agriculture, Apiary Program, <http://www.mda.state.mn.us/apiary> (last visited Mar. 12, 2006).

110. See MINN. DEP'T OF AGRIC., HONEYBEE COMPLAINT INVESTIGATIONS FACT SHEET 1 (2003), <http://www.mda.state.mn.us/appd/pesticides/beescomplaints.pdf>.

111. *Id.*

112. *Id.* Three of the investigations resulted in financial penalties issued to the beekeepers themselves for illegal pesticide use in their own hives. *Id.*

113. *Id.* The remaining investigation determined that an insecticide was the likely cause of death of the bees, but could not locate an applicator or an appropriate site for the type of insecticide found. *Id.*

114. *Id.* at 2. Again, one complaint was dismissed after the discovery of illegal pesticide use by the beekeeper to control honey bee pests. *Id.*

115. *Id.* at 1.

116. *Id.* at 2.

As a result of these investigations, and with the cooperation of all interested parties, the MDA has published a set of “best-management practices,” which suggests strategies for beekeepers, pesticide users, and the MDA in an attempt to address bee mortality problems and make future investigations easier.<sup>117</sup>

#### IV. A LEGAL HISTORY OF PESTICIDE ACTIONS

##### A. *Common Law Negligence*

A landowner has an obligation to make reasonable use of his or her property so that no unreasonable harm is caused to others in the vicinity.<sup>118</sup> This “reasonable use” rule is followed in Minnesota.<sup>119</sup> Through application of this rule, landowners have

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117. *Id.* The seven step best-management practices are as follows:

- (1) Frequent inspection by beekeepers of their colonies to allow timely reporting to the MDA of alleged bee kills . . .
- (2) Apiarists should minimize their own use of insecticides . . . inside hives to control bee pests. . .
- (3) Those using insecticides in areas of high apiary concentrations should use the least toxic insecticide necessary to control a particular pest.
- (4) Pesticide applicators should determine bee hive locations . . . in the vicinity of proposed spray operations prior to making any application. . .
- (5) Hybrid poplar growers should implement integrated weed control strategies to reduce the presence of blooming weeds . . .
- (6) The University of Minnesota . . . should research effective cottonwood leaf beetle control strategies that pose minimal risk to honeybees and other non-target organisms.
- (7) MDA staff, apiarists and others should periodically review and offer proposed improvements to MDA’s inspection protocols and procedures related to investigations of reported honeybee problems.

*Id.*

118. See Brett & Potter, *supra* note 43, at 380 (stating that a landowner’s common law privilege is qualified by the rights of neighbors to be safe from unreasonable harm on their own land). See generally 2 C.J.S. *Adjoining Landowners* § 68 (2005) (stating that a landowner’s privilege to use land is “qualified by due regard for others who may be affected by a landowner’s activities on the property”).

119. See *Depue v. Flateau*, 100 Minn. 299, 303, 111 N.W. 1, 2 (1907).

[W]henver a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect. This principle . . . protects the trespasser from wanton or willful injury.

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not generally been held liable for damage to bees or other animals<sup>120</sup> caused by pesticides sprayed on their own property.<sup>121</sup> In Minnesota, a landowner only has a duty to trespassing animals if and when they are discovered on the land, and then only to use reasonable care to avoid injuring them.<sup>122</sup> An animal's owner is entitled to recover for a wrongful injury to an animal resulting from a *willful act*.<sup>123</sup>

It is not uncommon for landowners to be held responsible for damage caused to property, plants, or animals when pesticides drift onto others' land during or after their application.<sup>124</sup> This is a regular occurrence in agriculture, sparking many "pesticide drift" cases.<sup>125</sup>

The most common standard of liability for damage caused to neighboring landowners' animals from pesticide use is negligence.<sup>126</sup> In order to succeed in a negligence<sup>127</sup> claim

*Id.*

120. See discussion *supra* Part III.A. (noting that bees are comparable to domesticated animals once they are reduced to a person's possession).

121. See generally J.P. Ludington, Annotation, *Liability for Injury to Trespassing Stock from Poisonous Substances on the Premises*, 12 A.L.R. 3d 1103 (2005) (discussing various cases in which landowners have not been held liable for the poisoning of animals who traveled onto their property).

122. See *Lindemann v. Chi., R.I. & P. Ry. Co.*, 154 Minn. 363, 365, 191 N.W. 825, 825-26 (1923) (holding that liability pertaining to trespassing animals could only be maintained upon a showing of willful or wanton negligence); *Wetherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, 414 (1878) (holding that the owner of an animal who wanders onto railroad tracks incurs all reasonable risks for the animal being injured by a train, but once discovered, the train operator must use reasonable care to avoid injuring them).

123. See 3B C.J.S. *Animals* § 426 (2004) (stating that landowners are not liable when trespassing animals ingest poison placed on the landowner's property for some other purpose, absent wanton or gross negligence). Gross negligence is "a conscious, voluntary act or omission in reckless disregard of a legal duty" which leads to consequences suffered by a third party. BLACK'S, *supra* note 78, at 1062.

124. See generally Jonathan M. Purver, Annotation, *Liability for Injury Caused by Spraying or Dusting of Crops*, 37 A.L.R. 3d 833 (2005) (discussing the facts of various cases concerning liability of landowners and crop dusters for damages to property resulting during pesticide spray applications).

125. See, e.g., *Lundberg v. Bolon*, 194 P.2d 454 (Ariz. 1948); *Hammond Ranch Corp. v. Dodson*, 136 S.W.2d 484 (Ark. 1940); *Miles v. A. Arena & Co.*, 73 P.2d 1260 (Cal. Dist. Ct. App. 1937); *Ky. Aerospray, Inc. v. Mays*, 251 S.W.2d 460 (Ky. 1952); *D & W Jones, Inc. v. Collier*, 372 So. 2d 288 (Miss. 1979); *Mustion v. Ealy*, 266 N.W.2d 730 (Neb. 1978); *McPherson v. Billington*, 399 S.W.2d 186 (Tex. Civ. App. 1965).

126. Brett & Potter, *supra* note 43, at 381.

127. Negligence is defined as

[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls



concerning pesticide use, a plaintiff must prove that the negligent application of pesticides on neighboring land was the cause of his or her crop or animal damages.<sup>128</sup>

A typical case concerning liability for negligence is *Miles v. A. Arena & Co.*<sup>129</sup> In *Miles*, the plaintiff sought damages for the destruction of fifty-six beehives allegedly killed by drifting pesticide dust from the defendant's land.<sup>130</sup> The plaintiff's bees were located on rented property near the defendant's farm.<sup>131</sup> The *Miles* court relied upon the rule that no landowner has the right to use his property in such a way that damage to a neighbor is foreseeable.<sup>132</sup> The court went on to hold that because of the evidence presented concerning the conditions at the time of the pesticide spraying, the defendants should have foreseen the damage to plaintiff's bees and were liable for damages.<sup>133</sup>

California is one jurisdiction that has addressed the unique issue of liability for damage to foraging bees, as opposed to bees on their own land. The issue was considered in *Lenk v. Spezia*,<sup>134</sup> in which the court held that landowners were not liable to foraging bees based upon the decision that the bees were trespassers.<sup>135</sup> The California District Court of Appeal held that an injured party could only recover for damages to bees if the pesticide was sprayed with the intention to destroy the bees and not for some other lawful

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below the legal standard established [by case law] to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights.

BLACK'S, *supra* note 78, at 1061.

128. Brett & Potter, *supra* note 43, at 381. A negligence claim must be grounded by four elements: duty, breach of duty, causation, and damages. BLACK'S, *supra* note 78, at 1062.

129. 73 P.2d 1260 (Cal. 1937).

130. *Id.* at 1261.

131. *Id.*

132. *Id.* at 1262. The *Miles* court relied upon the *Restatement (First) of Torts*, which states that a land possessor may be held liable for injury caused by an artificial condition on his land which creates an "unreasonable risk of bodily harm to persons outside the land because of [its] plan, construction, location or otherwise." RESTATEMENT (FIRST) OF TORTS § 364 cmt. a (1934).

133. *Miles*, 73 P.2d at 1263. The conditions referred to by the court were the facts that a substance known to be poisonous to bees was being used and at the time of the application a breeze was blowing. *Id.*

134. 213 P.2d 47 (Cal. Dist. Ct. App. 1949).

135. *Id.* at 51 (holding that the owner of bees cannot recover for their death from poisons procured while trespassing on another's land "unless the poison was distributed wantonly, maliciously, or with the deliberate intent to injure or destroy the bees").

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purpose.<sup>136</sup> This common law negligence decision was based primarily upon the generally accepted rule that a landowner is not bound to keep the premises safe for others' trespassing animals.<sup>137</sup>

*B. Strict Liability*

A few jurisdictions have found that the application of pesticides is an ultrahazardous activity.<sup>138</sup> In *Loe v. Lenhardt*,<sup>139</sup> the Oregon Supreme Court stated that "[t]he authorities are practically uniform in holding that crop dusting is an activity sufficiently freighted with danger to impose liability upon the landowner having the work done if negligence is proven," even if there is no fault, or if the fault lies entirely with an independent contractor.<sup>140</sup>

Courts have recognized liability for pesticide use as an ultrahazardous activity for various reasons. Some cite the foreseeability of the pesticide to drift onto neighboring properties.<sup>141</sup> Others base their classification solely upon the intrinsically dangerous characteristics of pesticides.<sup>142</sup> Regardless,

136. *Id.*

137. *Id.* The *Lenk* court stated that the defendants had no affirmative duty to protect the plaintiff's trespassing bees from the danger of poison on the land. *Id.* (citing *Jeanes v. Holtz*, 211 P.2d 925 (Cal. Dist. Ct. App. 1949); *Holt v. Mundell*, 112 P.2d 1039, 1043 (Colo. 1941)); see also *Ludington*, *supra* note 121.

138. An ultrahazardous (abnormally dangerous) activity is one which "necessarily carries with it a significant risk of serious harm even if reasonable care is used." BLACK'S, *supra* note 78, at 5. To determine whether an activity is ultrahazardous, one must analyze

whether there is a high degree of risk of harm, whether any harm caused will be substantial, whether the exercise of reasonable care will eliminate the risk, whether the activity is a matter of common usage, whether the activity is appropriate to the place in which it occurs, and whether the activity's value to society outweighs its dangerousness.

*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 520 (1977)).

139. 362 P.2d 312 (Or. 1961).

140. *Id.* at 315. The *Loe* court further discussed the notion that traditional practice requires the court, when determining whether an activity is ultrahazardous or not, to evaluate and balance the utility of the activity against the risk of harm it may cause if miscarried. *Id.* at 316.

141. See, e.g., *Copeland v. Hollingsworth*, 535 S.W.2d 815, 816 (Ark. 1976) (holding that because of the great probability of pesticide sprays to spread to nearby property and cause damage, a landowner could not delegate liability for the activity to the independent contractor employed to spray the pesticide).

142. See, e.g., *Pendergrass v. Lovelace*, 262 P.2d 231, 232 (N.M. 1953) (stating that the test for liability hinged upon whether danger is inherent in the performance of an activity and finding that "depositing an insecticide, consisting of a poisonous dust or spray, on a field" is an example of such an inherently dangerous activity) (quoting 57 C.J.S. *Master and Servant* §§ 590(b), 591(a)).

in jurisdictions where strict liability<sup>143</sup> applies to pesticide damages, courts do not ask whether the defendant acted with due care, but only whether the defendant's actions caused the damage.<sup>144</sup>

A classic strict liability application can be seen in *Winston v. State Department of Highways*,<sup>145</sup> in which the plaintiff sued to recover damages for the deaths of four bulls, allegedly as the result of their ingesting arsenic sprayed by the defendant while constructing a concrete underpass.<sup>146</sup> The *Winston* court based its ruling upon the idea that a person cannot use his land in a way that will cause damage to his neighbors.<sup>147</sup> The court held that regardless of whether or not the defendant used due care in conducting the arsenic spraying, it caused the death of the plaintiff's bulls and he should be held strictly liable.<sup>148</sup>

### C. Negligence Per Se

Negligence per se arises not from a common law duty stemming from case law decisions, but from a statutory duty.<sup>149</sup> In other words, the reasonable person standard of care is replaced by a statutory standard.<sup>150</sup> Because all pesticide applicators are required to comply with FIFRA label instructions, many jurisdictions find it to be contrary to legislative intent to apply common law negligence theories to pesticide cases.<sup>151</sup>

Wisconsin is another jurisdiction that has considered the issue

143. Strict liability "does not depend on actual negligence or intent to harm, but . . . is based on the breach of an absolute duty to make something safe." BLACK'S, *supra* note 78, at 934. Ultrahazardous activities form one category of cases in which strict liability applies. *Id.*

144. Brett & Potter, *supra* note 43, at 392.

145. 352 So. 2d 752 (La. Ct. App. 1977).

146. *Id.* at 752.

147. *Id.* at 755. "Although a proprietor may do with his estate whatever he pleases, still he can not [sic] make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." *Id.* (quoting LA. CIV. CODE ANN. art. 667 (1977)).

148. *Id.*

149. BLACK'S, *supra* note 78, at 1063.

150. Elder v. Allstate Ins. Co., 341 F. Supp. 2d 1095, 1099 (D. Minn. 2004) (citing Seim v. Garavalia, 306 N.W.2d 806, 810 (Minn. 1981)).

151. See, e.g., Henderson v. Dep't of Agric., 875 P.2d 487 (Or. Ct. App. 1994); Ward v. N.E. Tex. Farmers Coop. Elevator, 909 S.W.2d 143 (Tex. App. 1995); Bennett v. Larsen Co., 348 N.W.2d 540 (Wis. 1984); see also Robert F. Blomquist, *Applying Pesticides: Toward Reconceptualizing Liability to Neighbors for Crop, Livestock and Personal Damages from Agricultural Chemical Drift*, 48 OKLA. L. REV. 393, 394-97 (1995).

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of liability for pesticide damage to foraging bees. In *Bennett v. Larsen Co.*,<sup>152</sup> the Wisconsin Supreme Court first decided that it was erroneous to classify honey bees as trespassers.<sup>153</sup> That decision was based upon the idea that a trespass has traditionally been held as an *uninvited* entry.<sup>154</sup> Thus, the court found it unreasonable to place honey bees in the same category as common trespassers because it would be almost impossible to keep bees off one's property if they are intent upon foraging there.<sup>155</sup>

The *Bennett* court then held that, in the absence of willful or wanton conduct, land possessors who follow pesticide label directions have no duty to foraging bees on their property, because they have the right to use their land as they see fit.<sup>156</sup> The court also expressly noted that the absence of a common law duty to honey bees did not preclude duties that may be imposed by statutes, which can modify the common law and create negligence per se liability.<sup>157</sup> Finally, the court held that, in light of a Wisconsin statute establishing a standard of care via pesticide label instructions, the failure to follow such instructions constituted negligence per se.<sup>158</sup>

"[B]reach of a statute gives rise to negligence per se if the persons harmed . . . are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent."<sup>159</sup> States, like Wisconsin, have usually enacted statutes prohibiting the use of pesticides in a manner inconsistent with FIFRA labels, which contain warnings such as "[d]o not apply while bees are actively foraging."<sup>160</sup> Thus, like in *Bennett*, most states

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152. 348 N.W.2d 540 (Wis. 1984).

153. *Id.* at 547 n.3.

154. *Id.* The court reasoned that if there is no way for a landowner to prevent a trespasser's entry, the trespasser status becomes "meaningless insofar as it relates to the rights and duties" of the landowner. *Id.* A trespass is a "wrongful entry on another's real property." BLACK'S, *supra* note 78, at 1541.

155. *Bennett*, 348 N.W.2d at 547 n.3.

156. *Id.* at 550.

157. *Id.* at 548-50.

158. *Id.* at 549.

159. *Alderman's, Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995) (citing *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558-559 (Minn. 1977)). Breach of the statute is conclusive evidence of negligence per se because the statute imposes a fixed standard of care, as opposed to the reasonable standard imposed under ordinary negligence. *Id.*

160. TRACY E. OUTLAW, CLEMSON UNIV. DEP'T OF PESTICIDE REGULATION, HOW TO PROTECT HONEYBEES FROM PESTICIDES 1 (Cam Lay ed., 2006), <http://dpr.clemson.edu/Acrobat/bulletin-5.pdf>.

are able to assign liability for pesticide damages based upon the theory of negligence per se if the plaintiff can prove that the defendant was not following a FIFRA label and had therefore violated a state statute.

## V. THE *ANDERSON* CASE

### A. *Facts*

Jeffrey Anderson and the other plaintiffs in *Anderson v. State Department of Natural Resources* were migratory commercial beekeepers with hives located in several Minnesota counties.<sup>161</sup> The plaintiffs had permission from several landowners to use the landowners' property for beekeeping in exchange for honey or small amounts of money.<sup>162</sup> The land upon which the beehives were located was adjacent to a poplar tree grove owned and managed by the defendants in the case: the State of Minnesota Department of Natural Resources (DNR) and International Paper Company (IP).<sup>163</sup> The defendants used the property for paper production and fuel research.<sup>164</sup> Plaintiffs' honey bees, which forage by nature, traveled "a radius of three to five miles, pollinating crops and plants in central Minnesota."<sup>165</sup>

In response to a cottonwood leaf beetle infestation in 1997 and 1998, the defendants retained a commercial spray operator to apply the pesticide Sevin® XLR Plus (Sevin) to their poplar groves.<sup>166</sup> Sevin, which is one of the most commonly used pesticides in the United States,<sup>167</sup> is also highly toxic to bees.<sup>168</sup>

161. 693 N.W.2d 181, 185 (Minn. 2005).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Anderson v. State Dep't of Natural Res.*, 674 N.W.2d 748, 751 (Minn. Ct. App. 2004), *aff'd in part, rev'd in part*, 693 N.W.2d 181 (Minn. 2005).

166. *Anderson*, 693 N.W.2d at 185.

167. BEYOND PESTICIDES, CHEMICAL WATCH FACTSHEET: CARBARYL 1 (2001), <http://www.beyondpesticides.org/pesticides/factsheets/Carbaryl.pdf>. Sevin is the brand name for the generic Carbaryl. *Id.*

168. *Id.* at 2; *see also Anderson*, 674 N.W.2d at 752 (stating that foraging bees can carry poisoned pollen back to the hive, where it can stay active for up to a year); Letter from Shawnee Hoover, Special Projects Director, Beyond Pesticides, to the Environmental Protection Agency, Office of Pesticide Programs (Nov. 16, 2004), *available at* [http://www.beyondpesticides.org/watchdog/comments/Carbaryl%20beyond%20pesticides%2012\\_04.pdf](http://www.beyondpesticides.org/watchdog/comments/Carbaryl%20beyond%20pesticides%2012_04.pdf) (containing a compilation of comments from U.S. beekeepers, beekeeping associations, public interest groups,

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Sevin's label explicitly instructs users not to apply the pesticide if bees are foraging in the area.<sup>169</sup> The beekeepers alleged that the DNR and IP knew of foraging bees on their property when they directed the pesticide spraying.<sup>170</sup> During one occasion in 1999, referred to by the parties as the "Swanson incident," one of the landowners estimated that Sevin was sprayed approximately 100 feet from several of the beekeepers' hives.<sup>171</sup> The Minnesota Department of Agriculture (MDA) lab confirmed that at least some of the bees found after the "Swanson incident" had died as a result of Sevin poisoning.<sup>172</sup> The DNR now has a policy, which was implemented in 2001, not to use Sevin on any of its groves without first notifying registered beekeepers.<sup>173</sup>

*B. Procedure*

*1. The Douglas County District Court*

The beekeepers brought suit against the DNR and IP, alleging three causes of action. First, they asserted that the defendants negligently created an unreasonable risk of harm to their bees.<sup>174</sup> Second, the plaintiffs argued that the defendants were negligent per se by using pesticides in a manner inconsistent with a label as

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and academic supporters to the Environmental Protection Agency concerning the bee caution contained on Carbaryl pesticides).

169. BAYER CROPSCIENCE, SEVIN® BRAND XLR PLUS CARBARYL INSECTICIDE 2 (2004), available at <http://bayercropscienceus.com> (follow "Labels/MSDS" hyperlink; then follow "Specimen Label (Section 3)" hyperlink under "Sevin® XLR Plus" heading). The bee caution on Sevin's label reads:

This product is highly toxic to bees exposed to direct treatment or residues on blooming crops or weeds. However, field studies have shown that SEVIN® brand . . . is less hazardous to honey bees than other carbaryl products when direct application to bees is avoided and the spray residues have dried. For maximum honey bee hazard reduction, apply from late evening to early morning or when bees are not foraging. *Do not apply this product or allow it to drift to blooming crops or weeds if bees are foraging in the treatment area.* However, applications may be made during foraging periods if the beekeeper takes . . . precautionary measures prior to bee flight activity on the day of treatment . . . .

*Id.* (emphasis added).

170. *Anderson*, 693 N.W.2d at 185.

171. *Id.*

172. *Id.*

173. *Anderson*, 674 N.W.2d at 752.

174. *Anderson*, 693 N.W.2d at 185.

defined in the Minnesota Pesticide Control Act (MPCA).<sup>175</sup> Finally, the beekeepers alleged that the DNR and IP had created a private nuisance.<sup>176</sup> The DNR and IP filed motions for summary judgment on all claims.<sup>177</sup> The district court granted summary judgment for the DNR and IP on all claims with the exception of a portion of the negligence claim related to the “Swanson incident,” which had been confirmed by the MDA lab and held by the court to be indicative of intentional and wanton conduct.<sup>178</sup>

## 2. *The Minnesota Court of Appeals*

The Minnesota Court of Appeals reversed the denial of summary judgment for the negligence claims relating to the “Swanson incident.”<sup>179</sup> The court held that because the DNR had hired an independent contractor to spray near the hives in the “Swanson incident,” the DNR could not be held vicariously liable for any resulting injury to the bees.<sup>180</sup> The court discussed the fact that other states had found pesticide spraying to be so dangerous that landowners who hire independent contractors to do the spraying could not avoid liability.<sup>181</sup> However, because the parties did not present evidence regarding whether or not spraying pesticides constitutes an ultrahazardous activity,<sup>182</sup> the court declined to change the general rule<sup>183</sup> that—absent an ultrahazardous activity—an employer is not liable for harm caused by an act of a general contractor.<sup>184</sup>

175. *Id.* The Minnesota Pesticide Control Act is codified at Minnesota Statutes section 18B.07.

176. *Anderson*, 693 N.W.2d at 185.

177. *Id.* at 185-86.

178. *Id.* at 186.

179. *Anderson v. State Dep’t of Natural Res.*, 674 N.W.2d 748, 759 (Minn. Ct. App. 2004), *aff’d in part, rev’d in part*, 693 N.W.2d 181 (Minn. 2005).

180. *Id.*

181. *Id.*

182. The general rule is that a party is not entitled to raise a question for the first time on appeal. *See Edelstein v. Duluth, Missabe & Iron Range Ry. Co.*, 225 Minn. 508, 516, 31 N.W.2d 465, 470 (1948) (stating that the theory upon which a case is tried must be adhered to on appeal); *see also Morton v. Bd. of Comm’rs*, 301 Minn. 405, 427, 223 N.W.2d 764, 771 (1974); *Duenow v. Lindeman*, 223 Minn. 505, 510, 27 N.W.2d 421, 425 (1947).

183. In Minnesota, the employer of a contractor is not liable for harm caused by an act or omission made by the contractor. *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403 (Minn. 1981) (citing *Rausch v. Julius B. Nelson & Sons, Inc.*, 276 Minn. 12, 149 N.W.2d 1 (1967)).

184. *Anderson*, 674 N.W.2d at 759. The court acknowledged that Minnesota

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The court of appeals affirmed the dismissal of the nuisance claim because the plaintiffs failed to “demonstrate an injury stemming from an interest in land.”<sup>185</sup> The court held that no nuisance claim exists if a party cannot show an injury to land,<sup>186</sup> and that bees could not be considered land.<sup>187</sup>

The court of appeals also affirmed the district court's dismissal of the other negligence claims, in which the plaintiffs alleged that the DNR and IP had a duty to use pesticides in a way that did not create an unreasonable risk of harm to their bees.<sup>188</sup> In doing so, the court relied upon the conclusions of the Wisconsin Supreme Court in *Bennett v. Larsen Co.*,<sup>189</sup> because it was one of only two jurisdictions in the United States to address what type of duty landowners owe to bees foraging on their property.<sup>190</sup> The court of appeals found that bees were not trespassers in the traditional sense, but that landowners nevertheless had a duty not to intentionally harm bees if they were on their property.<sup>191</sup> However, the defendants were not held liable for negligence because there was no evidence of intentional or wanton conduct on their part.<sup>192</sup>

Finally, the court of appeals affirmed the district court's dismissal of the plaintiffs' negligence per se claim, which alleged that the DNR and IP applied the pesticide inconsistent with the bee caution on Sevin's label.<sup>193</sup> The court of appeals deferred to the expert testimony of a MDA director, who stated that Sevin's bee caution should be interpreted to mean that the pesticide should not be applied when “a *significant* number of blooming crops or

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courts have not yet addressed whether the Second Restatement of Torts' ultrahazardous activity exception applies to an independent contractor spraying pesticides but have ruled that if the spraying were determined to be ultrahazardous, then an employer would be held vicariously liable for any damage caused by it under the non-delegable duty rule. *Id.* (citing *Kellen v. Mathias*, 519 N.W.2d 218, 221 (Minn. Ct. App. 1994)).

185. *Anderson*, 674 N.W.2d at 760.

186. *Id.* (quoting *Am. Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1494 (D. Minn. 1991)).

187. *Id.*

188. *Id.* at 758.

189. 348 N.W.2d 540 (Wis. 1984).

190. *Anderson*, 674 N.W.2d at 757.

191. *Id.* at 757-58.

192. *Id.* at 758. The court of appeals found that neither IP nor the DNR intentionally meant to harm the bees because their sole purpose in spraying the pesticides was to stop the beetle infestation in their poplar groves and not to rid their land of honey bees. *Id.*

193. *Id.* at 753.



weeds are present . . . [and] a *significant* number of bees are *actively* foraging in the treatment area.”<sup>194</sup> The court held that the beekeepers had not proven that a significant number of bees were actively foraging in the poplar groves during the pesticide application, so Sevin’s label was not violated.<sup>195</sup>

### 3. *The Minnesota Supreme Court*

The Minnesota Supreme Court, in a four-to-two decision,<sup>196</sup> affirmed the dismissal of the private nuisance claim based upon the fact that “[p]rivate nuisance is limited to real property interests.”<sup>197</sup> However, the court held that summary judgment against the beekeepers on the negligence and negligence per se claims was improper.<sup>198</sup>

The supreme court first concluded that land possessors who have knowledge of foraging honey bees on their property have a duty of reasonable care not to harm the bees.<sup>199</sup> The court reasoned that such a duty stems from the general duty of landowners not to use their property in a way that would cause injury to another’s property.<sup>200</sup> The court acknowledged that liability had regularly been imposed upon landowners who sprayed pesticide that then drifted onto another’s property and killed bees,<sup>201</sup> but that it had not yet been imposed in cases involving bees coming in contact with pesticides while foraging on another’s property.<sup>202</sup> However, the court reasoned that it has long been held that once a trespassing animal is discovered upon the property, a landowner is “bound to use reasonable care to avoid injuring [it].”<sup>203</sup>

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194. *Id.* at 754.

195. *Id.*

196. Justice G. Barry Anderson took no part in the consideration or decision of this case.

197. *Anderson v. State Dep’t of Natural Res.*, 693 N.W.2d 181, 192 (Minn. 2005).

198. *Id.*

199. *Id.* at 189 n.4.

200. *Id.* at 186 (citing *Farrell v. Minneapolis & R.R. Ry. Co.*, 121 Minn. 357, 361, 141 N.W. 491, 492 (1913)).

201. *Id.* at 187 (citing *Lundberg v. Bolon*, 194 P.2d 454, 459 (Ariz. 1948); *McKennon v. Jones*, 244 S.W.2d 138, 139 (Ark. 1951); *Miles v. A. Arena & Co.*, 73 P.2d 1260, 1263 (Cal. Dist. Ct. App. 1937)).

202. *Id.* (citing *Lenk v. Spezia*, 213 P.2d 47, 51 (Cal. Dist. Ct. App. 1949); *Bennett v. Larsen Co.*, 348 N.W.2d 540, 547-48 n.3 (Wis. 1984)).

203. *Id.* (quoting *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, 414

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The supreme court next decided that it was unnecessary to classify the honey bees' entry onto the defendants' land because the resulting duty of reasonable care was the same regardless of whether or not the bees were deemed trespassers.<sup>204</sup> In addition, the court had difficulty identifying honey bees as classic trespassers<sup>205</sup> because they forage in order to pollinate crops and their entry results in a benefit to the landowner.<sup>206</sup> The court therefore found that because bees and honey are important aspects of agriculture, it would be against public policy to classify them as trespassers.<sup>207</sup>

The supreme court also declined to place a duty upon land possessors to investigate their land for honey bees prior to using pesticides.<sup>208</sup> Although Minnesota requires beekeepers to register annually so that pesticide applicators can easily locate nearby apiaries,<sup>209</sup> the court found that it is more practical for beekeepers themselves to provide notice to those that own land where the bees may forage.<sup>210</sup>

The supreme court acknowledged the extensive efforts of the legislature to address the damaging effects of pesticides through FIFRA and its preemptive effect upon state negligence claims.<sup>211</sup> However, because FIFRA only preempts claims based upon breach of warranty, failure to warn, or the EPA's enforcement of label requirements, the court found that the beekeepers still had a common law negligence claim against the DNR and IP.<sup>212</sup>

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(1878)).

204. *Id.* The court held that if the beekeepers' allegation that the DNR and IP knew about the foraging bees was correct, trespasser classification was unnecessary because even if the bees were trespassing, the landowner still has a duty of reasonable care once they are discovered on the land. *Id.*

205. A trespasser is "one who intentionally and without consent or privilege enters another's property." BLACK'S, *supra* note 78, at 1543.

206. *Anderson*, 693 N.W.2d at 187 n.2.

207. *Id.*

208. *Id.* at 187 n.3.

209. MINN. STAT. § 19.64, subd. 1 (2004). "Every person who owns, leases, or possesses colonies of bees shall register the bees with the commissioner[;] . . . [t]he registration application shall include . . . a description of the exact location of each of the applicant's apiaries by county, township, range, and quarter section . . . ." *Id.*

210. *Anderson*, 693 N.W.2d at 187 n.3.

211. *Id.* at 188. The preemptive effect of FIFRA is that "[a] State may regulate the sale or use of any federally registered pesticide . . . in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v (2000).

212. *Anderson*, 693 N.W.2d at 188.

The supreme court next considered whether the plaintiffs had presented sufficient evidence to demonstrate that the defendants had knowledge of the honey bees on their property.<sup>213</sup> Primarily based upon documents presented by the beekeepers from a 2000 meeting where IP and the DNR were informed of the bees' presence and the negative impact of Sevin, the court held that summary judgment against the plaintiffs was improper.<sup>214</sup> The court also determined that the plaintiffs should be allowed to continue with their negligence claim based upon the "Swanson incident" because the DNR had retained control over the contractor doing the spraying and thus could be found negligent for that incident as well.<sup>215</sup>

Finally, the supreme court reviewed the negligence per se claim in relation to a violation of Sevin's label.<sup>216</sup> The statutory violation alleged by the plaintiffs was the MPCA,<sup>217</sup> which prohibits the use of pesticides in a manner that is "inconsistent with a label or labeling as defined by FIFRA."<sup>218</sup> Unlike the court of appeals, the supreme court concluded that the MDA expert's testimony was not entitled to deference because the expert was not an agency decision-maker and was obtained solely for the purpose of litigation.<sup>219</sup> In addition, the court found that conflicting expert testimony on behalf of both parties created genuine issues of material fact, thus precluding summary judgment against the beekeepers.<sup>220</sup>

#### 4. *The Minnesota Supreme Court Dissent*

Justice Meyer, joined in dissent by Chief Justice Blatz, argued that the majority was "plowing new ground in tort law by recognizing a common law duty owed to foraging bees."<sup>221</sup> The dissent disagreed with the majority's conclusion that landowners

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213. *Id.* at 188-89.

214. *Id.* at 189.

215. *Id.* (citing *Conover v. N. States Power*, 313 N.W.2d 397 (Minn. 1981)). The *Conover* court determined that an exception to the general rule that an owner is not liable for a contractor's actions exists if the owner retains detailed control over a project and then fails to carefully supervise the contractor. *Conover*, 313 N.W.2d at 403.

216. *Anderson*, 693 N.W.2d at 189-90.

217. MINN. STAT. § 18B.07 (2004).

218. *Id.* § 18B.07, subd. 2(a)(1).

219. *Anderson*, 693 N.W.2d at 191.

220. *Id.*

221. *Id.* at 193 (Meyer, J., dissenting).

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have a duty to use their land in a way that does not injure the property of others.<sup>222</sup> The dissent suggested that the proper duty of landowners is correctly stated as being a “duty not to create ‘a serious interference with [neighbors’] use and enjoyment of land by pollution or the like.’”<sup>223</sup>

The dissent favored the Wisconsin Supreme Court’s decision in *Bennett v. Larsen, Co.*,<sup>224</sup> which states that landowners owe no duty to foraging bees on their property other than to avoid intentionally or wantonly destroying the bees.<sup>225</sup> The dissent criticized the majority’s reasoning that a common law duty exists based upon the legislature’s enactment of protective statutes regarding pesticides because it did not make sense for a common law duty to “spring[] from a duty arising from state or federal regulation.”<sup>226</sup>

Because a negligence per se claim arises from a statutory violation as opposed to a common law violation, the dissent felt that a remedy stemming from negligence per se was the more appropriate route for the beekeepers.<sup>227</sup> Justice Meyer questioned the ability of a jury to determine whether or not pesticide spraying created an unreasonable risk without consulting a pesticide’s label requirements.<sup>228</sup> Because the majority had concluded that the beekeepers could sustain a claim for negligence per se, the dissent concluded that it was unnecessary to allow a claim under ordinary common law negligence.<sup>229</sup>

VI. ANALYSIS OF THE *ANDERSON* DECISIONA. *Honey Bees as Trespassers*

Courts considering the issue of a pesticide user’s duty to foraging bees often seem to have trouble with the classification of bees as trespassers. The Wisconsin Supreme Court concluded in *Bennett* that it is the “uninvited entry onto the property” which

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222. *Id.* at 192.

223. *Id.* (citing DAN B. DOBBS, THE LAW OF TORTS § 231 (2000)).

224. 348 N.W.2d 540 (Wis. 1984).

225. *Anderson*, 693 N.W.2d at 193 (Meyer, J., dissenting) (citing *Bennett*, 348 N.W.2d at 547 n.3).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

creates a trespass, and bees are not necessarily uninvited.<sup>230</sup> Similarly in *Anderson*, the Minnesota Supreme Court declined to classify bees as trespassers because it would be “problematic to characterize bees as unwelcome on land where trees and other vegetation are grown for commercial purposes” due to their beneficial effect upon such land.<sup>231</sup>

A trespasser is defined as one who “intentionally and without consent or privilege enters another’s property.”<sup>232</sup> The question that arises upon analysis of the *Anderson* decision is whether honey bees should fail to qualify as trespassers because they may provide a benefit to the land upon which they forage.

Defining bees as trespassers is irreconcilable with the notion that if one provides a benefit to the landowner, the person providing the benefit cannot be classified as a trespasser. However, the title of trespasser applies both to the “wicked and the innocent.”<sup>233</sup> It would indeed be problematic to define honey bees as wicked per se given the benefits that they provide in agriculture.<sup>234</sup> But *Anderson* must be distinguished from situations in which a landowner has expressly consented or hired a commercial beekeeper to provide bees for pollination. Simply because honey bees may benefit owners of adjoining land does not mean they are immune from the theory of trespass.<sup>235</sup> In *Anderson*, the honey bees were neither solicited nor invited onto the DNR or IP property, and thus must be trespassers.

In fact, the Minnesota Supreme Court inadvertently classified the honey bees as trespassers because it applied the traditional rule relevant to trespassing livestock in Minnesota.<sup>236</sup> The *Anderson* court declined to use the actual definition but still went on to base its decision on the landowner’s duty of reasonable care “once he

230. *Bennett*, 348 N.W.2d at 547.

231. *Anderson*, 693 N.W.2d at 187 n.2.

232. BLACK’S, *supra* note 78, at 1543.

233. *Id.*

234. See discussion *infra* Parts III.A-B. regarding the various benefits conferred upon the agricultural industry by honey bees.

235. The intent or motive behind an action is immaterial to a trespass claim. 87 C.J.S. *Trespass* § 6 (2005); see also *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507, 512 (Mo. 1970) (holding that an act may be done in good faith or with honest intentions but still create liability for trespass in the actor); *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219, 224 (Tex. 1977) (stating that one can be a trespasser in good faith).

236. *Anderson*, 693 N.W.2d at 187 (citing *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, 414 (1878)).

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knows . . . the *trespasser's* presence.”<sup>237</sup> This reasoning will undoubtedly create confusion in tort cases based upon trespassing theory, much like the confusion the Minnesota Supreme Court hoped to quash when abolishing the distinction between licensees and invitees.<sup>238</sup>

### B. Common Law Negligence

The Minnesota Supreme Court's decision provides landowners using pesticides with a common law duty of reasonable care to foraging bees that they know are on their property.<sup>239</sup> The *Anderson* court's conclusion was based upon a landowner's general duty not to use land in a way that injures another's property.<sup>240</sup> This is the same reasonable use rule that has usually been applied in making the determination that landowners *are not* liable for damage to bees or other animals caused by pesticides sprayed on their own property.<sup>241</sup> The *Anderson* court applied the reasonable use rule in a way that is inconsistent with its previous application and understanding by courts in other jurisdictions.<sup>242</sup> The question remains as to whether this is a logical interpretation of the general rule for the unique situation presented by foraging bees.

In its decision, the *Anderson* court cited the traditional Minnesota rule that landowners have a limited duty to trespassing livestock.<sup>243</sup> Under that rule, Minnesota landowners can only be

237. *Id.* (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 593 (2000)) (emphasis added).

238. *Peterson v. Balach*, 294 Minn. 161, 164, 199 N.W.2d 639, 642 (1972). Prior to the Minnesota Supreme Court's decision in *Peterson*, liability towards entrants on one's land was determined according to whether the law regarded the entrant as a licensee or an invitee. *Id.*, 199 N.W.2d at 642. Because of the confusion this created in the courts and for landowners, the court decided the distinction should be abolished. *Id.* at 171, 199 N.W.2d at 646.

239. *Anderson*, 693 N.W.2d at 188-89.

240. *Id.* at 186.

241. *See* Ludington, *supra* note 121 (summarizing several cases from various jurisdictions where a landowner was sued for the injury or death of livestock caused by ingesting a poisonous substance while trespassing and was held as not liable per the general rule that landowners are not bound to keep the premises safe for trespassing animals of others).

242. *See, e.g.,* Beinhorn v. Griswold, 69 P. 557 (Mont. 1902) (holding that a mine operator had no affirmative duty to protect a neighboring landowner's cattle from ingesting poison while on his land); *Tenn. Chem. Co. v. Henry*, 85 S.W. 401 (Tenn. 1905) (holding that a landowner had no obligation to keep his premises safe for trespassing animals).

243. *Anderson*, 693 N.W.2d at 187 (citing *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, 414 (1878)).

held liable for injuries to trespassing animals if they are proven to be grossly negligent in their actions towards the animals.<sup>244</sup> Willful negligence is proven by showing that after discovering the trespassing animals, the landowner acted intentionally in such a way as to injure them.<sup>245</sup>

Because the *Anderson* court cites the above rules in its reasoning, the court's conclusion is not plausible. If the DNR and IP had placed a poisonous substance on their land with the intent to kill the honey bees foraging there, they could certainly be liable for negligence under the Minnesota rule. However, they did not have that intent. Instead, they sprayed pesticide on their land solely in an effort to rid it of damaging pests.<sup>246</sup>

For a plaintiff to succeed in a negligence claim, there must also be proof that the negligent application of pesticides caused the damage to animals or crops.<sup>247</sup> In *Anderson*, the plaintiffs offered proof of causation for only the "Swanson incident."<sup>248</sup> Thus, the plaintiffs' claims failed to satisfy the breach of duty and causation requirements necessary to hold pesticide users liable under the traditional reasonable use rule as applied in Minnesota.<sup>249</sup>

There is a reason that the reasonable use rule has generally been found to place liability upon pesticide users only in pesticide drift cases. In those cases, it is easy to contemplate ways in which reasonable landowners would act in order to avoid injuries to those on neighboring land. For example, a reasonable landowner would probably not spray pesticide when there is a strong wind blowing towards the neighboring property.<sup>250</sup> However, in the unique situation presented by foraging bees on the landowner's property, the rule is difficult to apply. This is at least partially due to the fact

244. *Lindemann v. Chi., R.I. & P. Ry. Co.*, 154 Minn. 363, 365, 191 N.W. 825, 825-26 (1923).

245. *See id.*, 191 N.W. at 825-26 (stating that men who were operating a train and saw trespassing animals on the tracks with time to avoid them could be liable based upon willful negligence for failing to avoid the animals).

246. *Anderson*, 693 N.W.2d at 185. The DNR and IP retained the pesticide sprayer solely to combat a cottonwood leaf beetle infestation. *Id.*

247. *See* discussion *infra* Part IV.A (describing the essential elements of a negligence claim).

248. *Anderson*, 693 N.W.2d at 185. *See infra* Part V.A for information related to the "Swanson incident" and the MDA's confirmation that Sevin caused the deaths of the honey bees in that one incident.

249. *See Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, 414 (1878).

250. *See Miles v. A. Arena & Co.*, 73 P.2d 1260 (Cal. 1937) (holding that damage to neighboring property was foreseeable because a wind was blowing at the time of the pesticide application).

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that there is no reasonable way for a landowner to prevent bees from entering the land to forage for nectar, at least not for more than short periods of time.<sup>251</sup>

*C. Negligence Per Se*

The *Anderson* court, in making the determination that the DNR and IP could be held liable for common law negligence, relied heavily upon legislative efforts to address pesticide hazards through FIFRA labeling requirements.<sup>252</sup> However, common law actions in negligence stem from judicial decisions rather than legislative efforts.<sup>253</sup> The violation of a statute that was created to standardize pesticide usage through label regulations falls within the principles of negligence per se, not common law negligence.<sup>254</sup>

Negligence per se is often easier to establish because the reasonable person standard of care is replaced by a fixed statutory standard.<sup>255</sup> Minnesota enacted the MPCA to prohibit the use of pesticides in a manner that is inconsistent with FIFRA labels.<sup>256</sup> The MPCA has thus created a statutory standard of care for pesticide users in Minnesota by prescribing the way in which they are to use pesticides, which is, in turn, regulated by federal statute under FIFRA. The label on Sevin has a lengthy caution relating to the pesticide's use near bee colonies.<sup>257</sup> Use of the pesticide in a manner inconsistent with that bee caution constitutes a violation of the MPCA and creates a cause of action for negligence per se.

The *Anderson* court acknowledged the statutory standard of care as a substitute for the reasonable person standard but failed to explain why both causes of action should be upheld in this situation.<sup>258</sup> The court made a point to recognize the legislative intent behind FIFRA regulations when determining if a common

251. See *Bennett v. Larsen Co.*, 348 N.W.2d 540, 547 n.2 (Wis. 1984).

252. *Anderson*, 693 N.W.2d at 188.

253. BLACK'S, *supra* note 78, at 293.

254. *Id.* at 1063; see also *Lynghaug v. Payte*, 247 Minn. 186, 193, 76 N.W.2d 660, 665 (1956) (holding that when the standard of conduct is prescribed by a statute, that standard is a "legislative substitute for the common-law standard of a reasonably prudent man").

255. *Elder v. Allstate Ins. Co.*, 341 F. Supp. 2d 1095, 1099 (D. Minn. 2004).

256. MINN. STAT. § 18B.07, subd. 2(a)(1) (2004).

257. *Anderson v. State Dep't of Natural Res.*, 674 N.W.2d 748, 751 (Minn. Ct. App. 2004), *aff'd in part, rev'd in part*, 693 N.W.2d 181.

258. *Anderson*, 693 N.W.2d at 189-90.



law duty of negligence was applicable;<sup>259</sup> however, it failed to make mention of such intent in the realm of negligence per se. Because the Sevin label prescribes specific cautions regarding its use with regard to honey bees, the resulting statutory standard of care should supplant the reasonable person standard of care in order to avoid confusion. If it does not, an applicator will not likely be able to determine which standard he is expected to follow.<sup>260</sup>

#### *D. Public Policy*

The *Anderson* court based much of its reasoning for the creation of a common law duty to foraging bees on the policy of protecting honey-producing operations as an important aspect of agriculture.<sup>261</sup> The court stated that to hold that the DNR and IP did not have a common law duty of reasonable care would be to “carve out an exception of liability for damage to honey-producing operations.”<sup>262</sup> However, is it not unfairly prejudicial to other agricultural operations to allow commercial beekeepers to bring both claims of negligence and negligence per se when negligence per se alone would suffice? The court did not balance its decision with the similar importance of using pesticides to increase and improve crop production.<sup>263</sup>

#### *E. Implications to Pesticide Users and Beekeepers*

The primary implication of the *Anderson* decision is that it sets a binding precedent in Minnesota.<sup>264</sup> Future litigation regarding a landowner’s duty to foraging bees on his own property will be determined according to the reasoning set forth in *Anderson*.<sup>265</sup> In

259. *Id.* at 188.

260. *See id.* at 193 (Meyer, J., dissenting). The dissenting opinion in *Anderson* presents a similar argument questioning how a jury would be able to determine what type of pesticide use constitutes a violation of the reasonable person standard without consulting the pesticide’s label requirements. *Id.*

261. *Id.* at 189-90.

262. *Id.* at 189 n.4. The court argued that “in referencing policy in support of our determination [that the DNR and IP had a duty of reasonable care to the foraging bees on their property], we are not recognizing a new common-law duty.” *Id.*

263. *See* discussion *supra* Part II.A.

264. The doctrine of stare decisis requires Minnesota courts to adhere to former decisions in order to provide more stability in the law. *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (citing *Naftalin v. King*, 257 Minn. 498, 509, 102 N.W.2d 301, 308 (1960)).

265. Under the theory of binding precedent, a lower court is obligated to

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addition, although they are not required to follow the Minnesota Supreme Court's decision, courts in other jurisdictions will likely evaluate *Anderson* in applicable cases as persuasive precedent.<sup>266</sup> *Anderson* is particularly relevant to other jurisdictions because it is one of only three decisions on the issue of liability to foraging bees and is the most recent decision.<sup>267</sup>

The *Anderson* precedent is troubling, considering the efforts that have been put forth by the MDA and the EPA to address pesticide hazards.<sup>268</sup> It essentially renders the MPCA and FIFRA label requirements void because, if an applicator is required to follow a reasonable person standard, there is no need for cautionary labels.<sup>269</sup> Even the lead plaintiff in this case, Jeffrey Anderson, did not feel that it was necessary for tort law to interfere if the State would properly administer FIFRA regulations.<sup>270</sup>

It is the Minnesota Supreme Court's duty to determine whether or not the lower court correctly applied the law.<sup>271</sup> The common law to be applied here was that a landowner has a duty only to avoid intentionally or wantonly harming honey bees foraging on the property.<sup>272</sup> The statutory law to be applied is for

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follow an applicable decision made by a higher court in its jurisdiction. BLACK'S, *supra* note 78, at 1215.

266. Persuasive precedent is not binding on a court, but is usually entitled to "respect and careful consideration" in similar cases. BLACK'S, *supra* note 78, at 1215.

267. Only California and Wisconsin have considered the exact situation presented by *Anderson*. See *Lenk v. Spezia*, 213 P.2d 47 (Cal. Ct. App. 1949); *Bennett v. Larsen Co.*, 348 N.W.2d 540 (Wis. 1984).

268. See *supra* Parts II.B, III.D.

269. See *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181, 188-89 (Minn. 2005) (holding that an applicator can be held to the reasonable person standard under a claim for negligence).

270. Pesticide.Net, *Applicators and Property Owners Liable if Pesticide Use Kills Foraging Honey Bees, Court Rules*, INSIDER EJOURNAL, Mar. 15, 2005, <http://www.pestlaw.com/insider/articles/200503150205/05-BeeSuit.htm>. Jeffrey Anderson responded to the case with the following:

I feel we shouldn't need tort law to protect us because we already have a statute, FIFRA, if only the states would enforce it. The precautionary bee statements lay it all out. If there are honey bees foraging you shouldn't be spraying, and, as long as everybody plays by that rule, we're okay.

*Id.*

271. MINN. R. CIV. P. 56.03; see also *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990) (stating that on appeal, it is the court's duty to determine whether there are issues of material fact and whether the lower courts erred in their application of the law).

272. See, e.g., *Lenk*, 213 P.2d 47; *Bennett*, 348 N.W.2d 540; see also 3B C.J.S. *Animals* § 426 (2004).

the DNR and IP to apply the pesticides according to the Sevin label.<sup>273</sup> It is not appropriate for the court to create a standard of care that may be inconsistent with the standard prescribed by the legislature.

How easy will it be for beekeepers to recover damages? They must be able to prove that the landowner had actual or constructive knowledge of foraging bees on the property.<sup>274</sup> The *Anderson* court held that state apiary registration is not enough to put pesticide users on notice.<sup>275</sup> The beekeepers must then prove that pesticide was carelessly sprayed and that the bees died as a result of the pesticide.<sup>276</sup> This could also be difficult given the track record of previous MDA complaints.<sup>277</sup> It would be easier to apply the standard set forth by FIFRA and the MPCA rather than trying to determine the reasonable person standard.

## VII. CONCLUSION

A negligence per se action in the *Anderson* case would have sufficed to bring all the parties' issues to light and allow the lower court to rule properly without the discrepancies between standards. The supreme court's decision will create confusion among pesticide users and anyone encountering the trespass doctrine under tort law. The real problem stems from the improper administration of policies set forth in FIFRA to specifically protect parties such as the plaintiffs in *Anderson*. By ruling that a common law action in negligence exists, the supreme court has reiterated the notion that the statutory duties are not being properly enforced. Ignoring the intent of the legislature to balance the interests of beekeepers and pesticide users in agriculture through FIFRA, the supreme court has set the scales in favor of one party's contributions to agriculture. By allowing a beekeeper to maintain a common law action for negligence, the Minnesota Supreme Court has incorrectly expanded the traditional duties of a land possessor towards trespassers.

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273. See MINN. STAT. § 18B.07 (2004).

274. *Anderson*, 693 N.W.2d at 187.

275. *Id.*

276. See discussion *supra* Part IV.A.

277. See discussion *supra* Part III.D.